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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75 - 1061

WESTERN GRAIN COMPANY, a corporation,

Appellant

v.

STATE OF ALABAMA,

Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS AND THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS AND MOTION TO AFFIRM

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INDEX.

	Page
Motion To Dismiss and Motion To Affirm	1
Opinions Below	3
Jurisdiction	3
Cases Concerned With Issue	6
Cases Cited By The Appellant Discussed	7
Constitutional Amendment, Statutes and Regulations	9
Amendment CCXII, Constitution of Alabama 1901	9
Act 107, Legislature of Alabama 1963, Regular Session, p. 289, Acts of Alabama 1963, Which Further Amended Section 402, Title 51, Code of Alabama 1940, Recompiled 1958	10
Regulation 402.2, Income Tax Laws and Regulations, State of Alabama 1952, p. 111	11
Questions Presented	12
Statement of the Case	13
Statement of the Facts	15
Argument	17
Review of Additional Cases cited By Appellant in Supplemental Jurisdictional Statement	30
Case Presents No Federal Question	30
Conclusion	32
Certificate of Service	36

CITATIONS.

Cases:

Cities Service Gas Company v. McDonald, 204 Kans. 705, 466 P.2d 277 ..... 6, 18, 26, 33, 34

Collector of Revenue v. Hunt, 246 La. 605, 165 So.2d 843 25

Corkran Oil and Development Co. v. Arnaudet, 26 S.Ct. 41, 199 U.S. 182, 50 L.Ed. 143 32

Dougherty v. Nevada Bank of San Francisco, Calif., 16 S.Ct. 258, 160 U.S. 171, 40 L.Ed. 382 32

French v. Taylor, 26 S.Ct. 76, 199 U.S. 274, 50 L.Ed. 189 31

Hooper v. City of Oshkosh, 213 N.W. 285, 192 Wis. 523 31

Phoenix Ins. Co. v. Gardner, Treasurer of Kings County New York 31

Sadler v. Jester, 46 F.Supp. 737 31

Standard Oil of Kentucky v. State, 294 Ala. 3, 313 So.2d 532 ..... 2, 3, 4, 5, 6, 18 19, 26, 27, 33, 34

State v. Western Grain, 318 So.2d 719 .....1, 2, 12, 13, 14 15, 16, 17, 18, 19, 20 21, 28, 29, 30, 33, 34

Trunkline Gas Company v. Collector of Revenue, 182 So.2d 674, cert. denied, 248 La. 1101, 184 So.2d . .6, 18, 23 24, 25, 33, 34

CONSTITUTIONAL PROVISIONS.

Amendment CCXII, Constitution of Alabama 1901, Volume 1, Code of Alabama, Recompiled 1958, 1973 Pocket Parts, p. 201 ..... 3, 4, 5, 9, 12, 13 17, 18, 19, 26, 34

STATUTES.

28 U.S.C., Section 1257 3

Section 402(13), Title 51, Code of Alabama 1940, Recompiled 1958 .....4, 10, 12, 17, 19 21, 22, 24, 25, 34

REGULATIONS AND RULES.

Rule 16, Revised Rules of the Supreme Court of the United States, 28 U.S.C.A., 1975 Pocket Part..... 1

Regulation 402.2, Income Tax Laws and Regulations, State Department of Revenue, 1952..... 3, 4, 11, 12, 17 19, 22, 24, 25, 34

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ON APPEAL FROM THE COURT OF CIVIL APPEALS AND THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS AND MOTION TO AFFIRM

Appellee pursuant to Rule 16, Revised Rules of the Supreme Court of the United States (U.S. Sup. Ct. Rule 16, 28 U.S.C.A., 1975 Pocket Part), moves that the Final Judgment and Decree of the Court of Civil Appeals of Alabama Reported in 318 So.2d 719 (Appendix A(2), Jurisdictional Statement of the Appellant); the Ruling Application For Rehearing, the Court of Civil Appeals of Alabama (Appendix A(4), Jurisdictional Statement of the Appellant); and the Denial of the Writ of Certiorari by the Supreme Court of Alabama (Appendix B(1), Jurisdictional

Statement) be affirmed on the following grounds: **first**, the jurisdictional statement of the Appellant does not present a federal question or, at the very least, it does not present a substantial federal question; **second**, the Supreme Court of Alabama denied certiorari to the Alabama Court of Civil Appeals (Jurisdictional Statement, Appendix B(1)) and the constitutional question was presented to the Supreme Court of Alabama in the Petition for Certiorari; **third**, the Court of Civil Appeals found adequate non federal basis on which to determine the issue and this fact was recognized in the Alabama Supreme Court's denial of Certiorari; (See Appendix A2 and Appendix B(1) Juris Statement.) **fourth**, the Court of Civil Appeals of Alabama in the case of **Standard Oil of Kentucky v. State**, 294 Ala. 3, 313 So.2d 532, decided a case of similar import; the **Standard Oil Case** was cited as authority in **State v. Western Grain**, supra, (Appendix A(2) p. 2, Jurisdictional Statement); the Petition for Certiorari was likewise denied and **fifth**, the questions presented are so unsubstantial that no further argument is warranted.

In the alternative the State moves that the Appeal by Western Grain (Jurisdictional Statement, Appendix C(1)) be dismissed and assigns the same grounds as were assigned on motion to affirm, preceding.

The questions raised in the lower court were of local concern in that they dealt primarily with a state of Alabama Constitutional amendment, a statute of the state of Alabama and a regulation of the Department of Revenue, State of Alabama which are set out herein, infra, and the construction of that amendment, that statute and that regulation by the courts of the State of Alabama as they applied to a corporation doing business in Alabama.

OPINIONS BELOW

This case is an appeal from a judgment of the Court of Civil Appeals of Alabama rendered on June 11, 1975 (Jurisdictional Statement, Appendix A(2) and the denial of a Petition for Certiorari by the Supreme Court of Alabama entered on October 30, 1975 (Jurisdictional Statement, Appendix B(1)). The Alabama Court of Civil Appeals had construed the identical questions in the case of **Standard Oil of Kentucky v. State**, supra, therefore, the questions were not of first impression in the Alabama Courts.

JURISDICTION

It will be noted in the statement as to jurisdiction in the Jurisdictional Statement of the Appellant, p. 2, thereof, the Appellant draws into its appeal under 28 U.S.C., Section 1257 (2), Regulation 402.2, Income Tax Laws, State Department of Revenue, State of Alabama, 1952, (Appendix D of Jurisdictional Statement and set out herein, infra under the heading Constitutional Amendment, Statutes and Regulations); and Amendment CCXII, Constitution of Alabama, 1901, Act 91, Laws 1963, Second Special Session of Legislature of Alabama (Also set out herein, infra). Counsel for Appellant avers that the constitutional amendment and the regulation as construed and applied to the Appellant, a foreign corporation, are "so arbitrary, unreasonable and discriminatory that it is (sic) repugnant to the Constitution and laws of the United States".

The Court of Civil appeals of Alabama deals with this exact question of discrimination in the opinion rendered in this case (Jurisdictional Statement of Appellant, Appendix A(2), pp. 10-12.) The language of the Court by Presiding Judge Wright is as follows:

"Western contends that the application of the amendment and regulations in such manner is discriminatory as to corporations who choose to join in consolidated returns and is constitutionally impermissible.

We are unable to perceive any discrimination. Every foreign corporation earning income in Alabama is taxed the same--upon taxable income after deduction of federal income taxes paid or accrued. The decision to join in a consolidated return for federal income taxes or file a separate return is that of the taxpayer. Filing a consolidated return is a privilege and results in a consolidated tax liability. 26 U.S.C.A. §1501. If it benefits in relief from federal taxes it may cost in the amount of deductions permitted by the State. Such results in a penalty by choice of the taxpayer. It is not discrimination by the State. We are cited to no case in point to the contrary."

The emphasis in the opinion of the Court of Appeals in the instant case is on the fact that the law, Constitutional Amendment CCXII, supra, as "construed in the light of statutes and regulations relating to the same subject, i.e., Title 51, Section 402(13), Regulation 402, deductions of federal income taxes is non discriminatory as applied to the Appellant. In the case of **Kentucky Standard Oil**, supra, the court applied the constitutional amendment, the statute and the regulation. In regard to Kentucky Standard Oil (Kyso) the Court by Judge Wright stated, in part:

"This court in the Kyso case held that amendment CCXII to the Alabama Constitution is to be construed in light of statutes and regulations relating to the same subject, i.e., Title 52, (Sic, 51) Sec. 402(13), Regulation 402.2, deductions of federal income taxes. We said,

'. . . .We interpret the phrase "paid or accrued" to mean the amount paid from the parent to the IRA. . .

To this court no federal income taxes were actually "paid" or "accrued" by Kyso by the filing of an accounting statement with Socal.'

We follow our construction of Amendment CCXII in **Kyso** in this case. Through Western, in bookkeeping terms, accrued on its books a calculated federal income tax which it would have been due to pay had it not chosen to use the consolidated return, it, in fact, did not pay such sum to the Internal Revenue Service nor did it incur liability for such payment. Such tax in terms of actual liability to the taxing authority did not accrue. The severable liability of the members of the affiliated group extends only to the tax due under the consolidated return. **IRS Reg.** Sec. 6 (a) 1.1502.

Appellee quotes from Vol. 8A, Mertens Law of Federal Income Taxation, Sec. 46.77, as follows:

" 'In computing separate taxable income of a member for use in the computation of consolidated taxable income under Regulation 1.1502-11 the starting point is a computation in accordance with the provisions for determining taxable income of separate corporations, with a number of specified exceptions.'

This quotation was given in support of the proposition that each member of the group consolidated for report of income and payment of taxes is the taxpayer and the amount of tax computed on its own taxable income and shown as accrued thereon is tax imposed upon it by the United States. We cannot agree such is, in fact, the case. Of course, the beginning point of a consolidated return is the sum of the taxable income of each member. Such is the case in the consolidated or joint return of a husband and wife. The taxable income of a group cannot be computed without first determining the taxable income of each member thereof. Each member of the group is a reporting unit insofar as its taxable income is determined, and all are severally liable for the tax due under the consolidated return, but there is no liability incurred, paid or accrued by a member of the group

according to its separate taxable income. Removal of such liability is one of several benefits derived from joining in a consolidated return.

We interpret the phrase 'paid or accrued' contained in the constitutional amendment to mean actually paid or a liability to pay. When filing a consolidated return the tax which would have been paid or accrued by a member had it not joined the group is not determined nor is it necessary to be determined, except as required by the agreement between the parent and the members of the group. No such liability is ever incurred or accrued insofar as the taxing authority is concerned."

CASES WHICH ARE CONCERNED WITH THE MATTER AT ISSUE

There appear to be only four cases which have come to grips with the exact question extant herein: that is, how will each state for state income tax purposes apportion the federal income tax of a corporation operating in the state where the corporation joins with its parent corporation in filing a consolidated return with the I.R.S.

One of the four cases is the one presently before this bar; the second is that of **Standard Oil of Kentucky v. State of Alabama,** supra; the third is **Trunkline Gas Company v. Collector of Revenue,** 182 So.2d 674, cert. denied 248 La. 1101, 184 So.2d 25; and the fourth is **Cities Service Gas Company v. McDonald,** 204 Kans. 705, 466 P.2d 277. Each of these cases was decided by an appellate court in their state of origin and in each case state laws were construed and three were determined by the construction of a state regulation promulgated by the state to implement the state statute. The absence of a regulation in Kansas was the key to the Court's opinion in **Cities Service Gas Company** case, supra.

THE CASES CITED BY THE APPELLANT IN ATTEMPT TO SUSTAIN JURISDICTION (JURISDICTIONAL STATEMENT, P. 7)

Counsel for Appellee has reviewed the cases cited by the Appellant in his attempt to sustain jurisdiction of the Supreme Court of the United States. None of the ten cases cited and discussed following are concerned with the filing of consolidated income tax returns and some of the cases are not even concerned with the subject of income taxation. They are not pertinent to the issue or issues at hand.

A cursory statement concerning the scope of each of the ten cases follows:

Hans Ree's Sons, Inc. v. State of North Carolina, 283 U.S. 123, 75 L.Ed. 879. The case involved the construction of a North Carolina Statute which took a far greater percentage of the income of the corporate taxpayer than was warranted by the business done by the taxpayer in the state.

General Motors Corporation v. District of Columbia, 380 U.S. 553, 14 L.Ed.2d 68, 85 S.Ct. 1156, involved the levy and collection of a District of Columbia Income and Franchise Tax. The taxing authorities violated the statutory authority vested in them by taxing the income of the corporation and not allocating any of the income to sources outside the District of Columbia.

Ivanhoe Irrig. Dist. v. McCracken, 357, U.S. 275, 2 L.Ed.2d 1313, 78 S.Ct. 1174, was not concerned with consolidated return; not even concerned with income taxation and not pertinent to the issue.

NAACP v. Alabama, 377 U.S. 288, 12 L.Ed.2d 325, 84 S.Ct. 1302, has no bearing on issues in the instant case. The question did not involve taxation but was concerned with whether the corporation could operate in Alabama.

Palmore v. U.S., 93 S.Ct. 1670, 411 U.S. 389, 36 L.Ed. 342, was a criminal case arising in California and having no bearing on the current controversy.

Durley v. Mayo, 351 U.S. 277, 100 L.Ed. 1178, 76 So.Ct. 806. This case was dismissed by the Supreme Court of the U.S.; however, it was a criminal case having little bearing on the questions at issue. The case was decided by the Florida Court on adequate state grounds.

WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117, 21 L.Ed.2d 242, 89 S.Ct. 286. This was an obvious flagrant violation of the rights of a non profit foreign corporation in New Jersey compared with the rights accorded similarly situated domestic corporations in New Jersey. Foreign corporation was denied exemption from ad valorem taxes which exemption was granted to domestic corporations. Has no bearing on the questions at issue in the instant case.

Carl M. Austin v. New Hampshire, 43 L.Ed.2d 530. Non residents of New Hampshire paid an individual income tax, a so-called commuter income tax. Residents of New Hampshire did not have a like tax levied on them. Thus a flagrant discrimination was involved. But the case has no relation to immediate issue before the bar.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437. The domestic Ohio corporation was taxed on the storage of goods in warehouse. Non resident did not have to pay a like tax on storage of goods for storage only. The Supreme Court of the U.S. stated, in part, as follows:

> ". . .The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation."

The statement quoted above is a firm statement of what the state of Alabama has done in the instant case. It has applied a state constitutional provision, a state statute and regulations equally to taxpayers in a class and has in no way discriminated against the taxpayer, Western Grain.

Wheeling Steel Corp. v. Glander, 337 U.S. 562, 93 L.Ed. 1544, Anno. 100 L.Ed. 1200. Foreign corporation operating in Ohio is entitled to the same rights in regard to ad valorem taxation as a domestic corporation.

CONSTITUTIONAL AMENDMENT, STATUTES AND REGULATIONS

AMENDMENT CCXII CONSTITUTION OF ALABAMA, 1901, (SEE VOLUME 1, CODE OF ALABAMA, RECOMPILED 1958, 1973 POCKET PARTS P. 201) provided as follows:

> "The legislature shall have power to levy and provide for the collection of taxes for state purposes on net income of corporations, from whatever source derived, for the calendar year 1963, or for any fiscal year beginning in the calendar year 1963, and each year thereafter at a rate not exceeding five percent. However, all federal income taxes paid or accrued within the taxable year by corporations shall always be deductible in computing net income taxable under the income tax laws of this state, provided that in the case of foreign corporations

the amount of federal income tax deductible shall be in proportion to income derived from sources within Alabama, to be determined in accordance with such laws as the legislature may enact."

Act 107, Legislature of Alabama, 1963, Regular Session, P. 289, Acts of Alabama, 1963, Volume 1 Which Further Amended Section 402, Title 51, Code of Alabama 1940, Recompiled 1958, provided, in part, as follows:

"Section 1. Code of Alabama 1940, Title 51, Section 402, as amended, is amended further to read as follows:

'Section 402. In computing the net income of domestic corporations doing business in this state subject to the tax imposed by section 398 of this title, there shall be allowed as deductions: * * *

(3) Taxes paid or accrued within the taxable year (a) imposed by the authority of the United States, except income taxes, * * * in the case of a non-resident individual or foreign corporation taxes paid or accrued within the State of Alabama or any county, school district, municipality or any other taxing subdivision of the State of Alabama excluding the income taxes levied and imposed under this title, plus the proportion of tax imposed by other authorities above mentioned which the amount of gross income from sources within the State of Alabama bears to the amount of gross income from all sources within and without the State of Alabama.'

* * * * * *

'(13) In the case of foreign corporations doing business in this state the deductions allowed by this section shall only be allowed if and to the extent that they are connected with income arising from sources within the State of Alabama, and the proper apportionment and allocation of deductions with respect to the sources of income within and without the State of Alabama shall be determined under the rules and regulations prescribed

by the department of revenue, provided that in the case of corporations doing a business partly within and partly without the state where revenue is apportioned or allocated to Alabama the expense in connection with such apportioned or allocated revenue shall be likewise apportioned or allocated to the state, for the purposes of deductions under this title, or the ratio that company expenses in Alabama bear to the company revenues in Alabama.'

Section 2. The provisions of this Act shall apply to income taxes due for taxable years beginning after December 31, 1962." (Emphasis supplied.)

REGULATION 402.2, INCOME TAX LAWS AND REGULATIONS, STATE OF ALABAMA, 1952, p. 111, provided, in part, as follows:

"A foreign corporation doing business in Alabama is entitled to the same deductions allowed a domestic corporation, but only to the extent that they are connected with income arising from sources within the State. A corporation having income from multi-state operations may apportion its income in accordance with Reg. 398.2, in which case allowable deductions must also be apportioned in the same manner.

* * * * *The amount of Federal income tax allocated to Alabama should be determined by the ratio that the net income from sources within Alabama bears to the total net income from all sources as shown by the Federal income tax return. The Federal income tax to be apportioned in this manner is the tax accrued as shown by the final Federal income and excess profits tax return of the taxpayer and reduced by any refund allowed and given during the tax year under the Federal statute. Such refund need not be included in income when apportionment is made in this manner." (Emphasis supplied.)

QUESTIONS PRESENTED TO THE SUPREME COURT OF THE UNITED STATES

1. Is the decision of the Court of Civil Appeals (Jurisdictional Statement Appendix A(2)) a valid decision in that it is not repugnant to the constitutional mandates of the U.S. or of Alabama as applied to the Appellant in the instant case?

2. Is the Constitutional Amendment, Amendment CCXII, Consitution of Alabama, 1901, supra, fair and equitable as applied to all corporations in the same class as the Appellant?

3. Is the statute, Section 402(13), Title 51, Code of Alabama 1940, Recompiled 1958, supra, wherein it provides in the case of foreign corporations for apportionment of tax to Alabama and deductions from tax in accordance with income produced in Alabama in proportion to income produced everywhere fair and equitable as applied to the Appellant?

4. Is the regulation, Regulation 402.2, Income Tax Laws and Regulations, Department of Revenue, 1952 (Reissued verbatim in 1960 and amended in 1971), supra, as an implementation to the statute, Section 402, supra, fair and equitable as applied to the Appellant?

5. Did the Court of Civil Appeals of Alabama in its opinion (Jurisdictional Statement Appendix A(2)) and did the Supreme Court of Alabama in its denial of certiorari (Jurisdictional Statement Appendix B(1)) fairly construe the application of the Constitutional Amendment, CCXII, supra, the statute, Section 402, supra, and the regulation, 402.2, supra, to the facts in the instant case and render an opinion which was just and equitable to the Appellant?

6. Are the issues under consideration of local state import only and have they been properly decided by the state courts?

7. Finally, is the opinion of the Court of Civil Appeals of Alabama (Jurisdictional Statement, Appendix A(2)) denial of certiorari by the Supreme Court of Alabama (Jurisdictional Statement, Appendix B(1)) so arbitrary, unreasonable and capricious when applied to the Appellant that the decisions are repugnant to the Federal Constitution so that a federal question is involved; and if so, is the question of such scope that it is substantial enough to warrant the Supreme Court of the United States assuming jurisdiction of the instant case?

STATEMENT OF THE CASE

This case arose as an appeal (R. pp. 1-7) in the Jefferson Circuit Court from an income tax assessment by the Department of Revenue against the Appellant, Western Grain. The assessments were for the years 1964, 1965 and 1966 entered on March 21, 1968 in the amounts of $10,180.87 for 1964 (R. pp. 205-207), $27,626.34 for 1965 (R. pp. 181-183) and $101,472.98 for 1966 (R. pp. 157-158). The pleadings were properly perfected and tried before the Jefferson Circuit Court before the Honorable William C. Barber on May 2, 1974. It was agreed orally at the hearing that the issues in the appeals for the three years were the same and that evidence adduced would be applicable for all three years. Subsequent to the appeal of the case by the State of Alabama to the Supreme Court of Alabama on motion by the Appellee, the three cases were consolidated by order of the Clerk of the Supreme Court (R. p. 283) so that one brief, one oral argument and one opinion would be sufficient to dispose of all three cases. The Court was properly organized (R. p. 1).

At the trial, the Appellant presented one witness, Mr. James W. Robertson (R. pp. 50-103) and the state presented two

witnesses, Mr. V. S. McElvy (R. pp. 104-122) and Mr. Gerald Martin (R. pp. 125-127). After the hearing the matter was submitted to the Court on the statement of counsel which were not recorded, the testimony of the witnesses, the exhibits, Joint Exhibit 1, (R. pp. 133-212), which was a stipulation agreed upon by the parties and a record of proceedings before the State Department of Revenue which led to the final assessments and to the appeal by the Appellant to the Jefferson Circuit Court. Further, the submission for final decree was based on Plaintiff's Exhibits 1, 2, 3, 4 and 5 (R. pp. 213-262). The Court after due consideration determined that the Appellant, Western Grain, was correct and a final decree (R. pp. 264-281) (Appendix A(1), Jurisdictional Statement) was entered in favor of Western Grain. From this adverse decree, the State of Alabama, Appellee, prosecuted its appeal to the Supreme Court of Alabama (R. pp. 282-283). The appeal was to the Supreme Court of Alabama; however, it was determined that the appeal should not be before the Supreme Court but before the Court of Civil Appeals and, therefore, by order of the Clerk of the Supreme Court dated January 27, 1975, the cases were transferred from the Supreme Court to the Court of Civil Appeals and assigned new numbers as follows: Civ. 525, 525A, 525B. Counsel for the State of Alabama found it necessary to request additional time for filing the State's brief and the Court of Civil Appeals by order of January 29, 1975 granted an extension to and include February 18, 1975.

After oral argument by counsel on April 21, 1975, the Alabama Court of Civil Appeals by Presiding Judge Wright gave an opinion (Jurisdictional Statement, Appendix A(2)) reversing the decree of the Jefferson Circuit Court (Jurisdictional Statement, Appendix A(1)). Western Grain petitioned the Court of Civil Appeals for rehearing which petition was denied (Jurisdictional Statement, App. A(2)).

Western Grain thereafter applied to the Supreme Court of Alabama for certiorari which petition was denied (Jurisdictional Statement B(1)). Subsequently, Western Grain petitioned the Supreme Court of Alabama for rehearing and this petition was overruled (Jurisdictional Statement, Appendix B(2)).

From the adverse ruling of the Court of Civil Appeals and the denial of Certiorari by the Supreme Court of Alabama, Western Grain appealed to this Honorable Court (Jurisdictional Statement, Appendix C(1)).

STATEMENT OF THE FACTS

As enumerated in the statement of the case preceding, final assessments were entered against the Appellee, Western Grain, for income tax for the years 1964, 1965 and 1966. They were entered on March 21, 1968 in the amount of $101,472.98 for the year 1966 (R. pp. 157-158), $27,626.34 for the year 1965 (R. pp. 181-183), $10,180.87 for the year 1964 (R. pp. 205-207). The taxes which were in dispute were based on income of Western Grain. The corporation is organized under the laws of the State of Delaware but it has its principal place of business in Birmingham, Alabama. It is engaged in the manufacture and milling of grain products which are marketed under the trade name, Jim Dandy.

The Appellant reported taxable income for 1964 in the amount of $691,417.81 and paid tax to the State of Alabama in the amount of $34,570.89 after taking a federal income tax deduction of $172,410.92 (R. p. 221). For 1965 the Appellant

reported net taxable income of $1,069,206.35 and paid Alabama income tax in the amount of $28,815.95 after taking a federal income tax deduction of $492,887.38 (R. p. 236). In 1966 the Appellant reported net taxable income of $3,019,790.78 and paid Alabama income tax in the amount of $55,350.54 after taking a federal income tax deduction of $1,912,780.00 (R. p. 246).

The amount of federal income tax deducted by the Appellant was the amount it would have paid to the federal government if it had filed a return directly with the I.R.S. rather than filing an accounting statement with Diversa for Diversa to file a consolidated return with the I.R.S.

The Appellant was operating on the accrual method of accounting and had during the years in question accrued federal income tax on their books; however, it was incumbent upon them to pay this sum to the parent, Diversa, under the concept of affiliated corporations paying the tax to the parent and the parent filing a consolidated return with the I.R.S. (R. p. 135) (See opinion of Court of Civil Appeals, Jurisdictional Statement, Appendix A(2)).

The State of Alabama disallowed the claimed federal income tax deductions for 1964, 1965 and 1966 and recomputed the amount to be deducted based on the actual amount the parent Diversa paid I.R.S. (R. p. 136).

In fact, Diversa did not pay any tax to I.R.S. (R. p. 135, line 18) so the entire sums claimed by the Appellant, Western Grain, were disallowed. That is, since Diversa after consolidating the gain subsidiaries with the loss subsidiaries did not in fact pay any tax to the federal government, the State disallowed the claim of $172,410.92 for 1964, (R. p. 135) the claim of

$492,887.38 (R. p. 135) for 1965 and the claim of $1,912,780.00 for 1966 (R. p. 135). (The worksheets showing the computations have been introduced into the record as Appellant's exhibits.)

The result of disallowance resulted in additional taxes being due for 1964, 1965 and 1966. Final assessments were entered as stated above for each of the years; i.e., $10,180.87 for 1964 (R. pp. 205-207); $27,626.34 for 1965 (R. pp. 181-183); and $101,472.98 for 1966 (R. pp. 157-519).

From these final assessments, the Appellant prosecuted its appeal to the Jefferson County Circuit Court. Judge Barber of the Jefferson Circuit rendered a decree in favor of the Appellant, Western Grain (Jurisdictional Statement, Appendix A(1)).

The appeal by the State and the reversal by the Court of Civil Appeals and subsequent proceedings in the state courts are delineated in the Statement of the case, preceding.

ARGUMENT

THERE IS NO FEDERAL QUESTION

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

THE JUDGMENT RESTS ON AN ADEQUATE NON FEDERAL BASIS

THE QUESTIONS ON WHICH THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER DISCUSSION

All of the above grounds will be argued together. There are essentially only one constitutional amendment, CCXII, Constitution of Alabama 1901, supra; one statute, Section 402, supra, and one regulation, 402.2, Income Tax Laws, State of Alabama which govern the issues in this case. There are two cases by the Alabama Court of Civil Appeals which have construed the

amendment, the statute and the regulation. The instant case **Western Grain Company v. State,** 318 So.2d 719, is one of the two cases and the case of **Standard Oil of Kentucky v. State,** 297 Ala. 3, 313 So.2d 532 is the second. Certiorari was denied in both cases by the Supreme Court of Alabama.

There are also two additional cases where similar issues have been raised. The first is that of **Trunkline Gas Company v. Collector of Revenue,** 182 So.2d 674, cert. denied, 248 La. 1101, 184 So.2d 25, and the second is that of **Cities Service Gas Company v. McDonald,** 204 Kans. 705, 466 P.2d 277.

The Alabama Court of Civil Appeals considered and construed Amendment CCXII supra, in its opinion (Jurisdictional Statement, Appendix A(2) pp. 3-4). The Court stated, in part, as follows:

> "The taxing authority of the State in this case is derived from Constitutional Amendment CCXII adopted December 10, 1963 which is as follows:
>
> 'State tax on net income of corporations.--The legislature shall have power to levy and provide for the collection of taxes for state purposes on net income of corporation, from whatever source derived, for the calendar year 1963, or for any fiscal year beginning in the calendar year 1963, and each year thereafter, at a rate not exceeding five percent. **However, all federal income taxes paid or accrued within the taxable year by corporations shall always be deductible in computing net income taxable under the income tax laws of this state, provided that in the case of foreign corporations the amount of federal income tax deductible shall be in proportion to income derived from sources within Alabama, to be determined in accordance with such laws as the legislature may enact.'** (As proposed by Act 91, Laws, 1963, 2nd Spec. Sess., and adopted at the election of December 10, 1963.) (Emphasis supplied.)"

The Court recognized the constitutional issue raised by Western Grain. The same issues without reference to the constitutional question had been postulated in the case of **Standard Oil of Kentucky v. State,** supra. The Court of Civil Appeals determined the Standard Oil case on adequate state grounds and in the outset of the opinion in the Western Grain case stated, in part, as follows: (Jurisdictional Statement, Appendix A(2) pp. 1-2)

> "There are three cases, one for each tax year, which were consolidated for trial and this appeal. Substantially the same issues of law are involved here as were considered by this court in the recent case of **Standard Oil of Kentucky (Kyso v. State,** _____ Ala. _____, _____ So.2d _____ [Ms. Civ. 526] March 5, 1975. Certiorari was denied by the Supreme Court on May 22, 1975. We find that disposition of this case is controlled by our decision in **Kyso except for the issue of constitutionality which we will discuss later in this decision.** (Emphasis supplied.)

The Court likewise found adequate state basis for finding in favor of the state in the Western Grain opinion as follows: (Jurisdictional Statement, pp. 7-10)

> "This court in the Kyso case held that amendment CCXII to the Alabama Constitution is to be construed in light of statutes and regulations relating to the same subject, i.e., Title 52, Sec. 402(13), Regulation 402.2, deductions of federal income taxes. We said,
>
> '. . . . .We interpret the phrase "paid or accrued" to mean the amount paid from the parent to the IRA. . . To this court no federal income taxes were actually "paid" or "accrued" by Kyso by the filing of an accounting statement with Socal.'
>
> We follow our construction of Amendment CCXII in **Kyso** in this case through Western, in bookkeeping terms accrued on its books a calculated federal income

tax which it would have been due to pay had it not chosen to use the consolidated return, it, in fact, did not pay such sum to the Internal Revenue Service nor did it incur liability for such payment. Such tax in terms of actual liability to the taxing authority did not accrue. The severable liability of the members of the affiliated group extends only to the tax due under the consolidated return. **IRS Reg.** Sec. 6(a) 1.1502.

Appellee quotes from Vol. 8A, Mertens Law of Federal Income Taxation, Sec. 46.77, as follows:

'In computing separate taxable income of a member for use in the computation of consolidated taxable income under Regulation 1.1502-11 the starting point is a computation in accordance with the provisions for determining taxable income of separate corporations, with a number of specified exceptions.'

This quotation was given in support of the proposition that each member of the group consolidated for report of income and payment of taxes is the taxpayer and the amount of tax computed on its own taxable income and shown as accrued thereon is tax imposed upon it by the United States. We cannot agree such is, in fact, the case. Of course, the beginning point of a consolidated return is the sum of the taxable income of each member. Such is the case in the consolidated or joint return of a husband and wife. The taxable income of a group cannot be computed without first determining the taxable income of each member thereof. Each member of the group is a reporting unit insofar as its taxable income is determined, and all are severally liable for the tax due under the consolidated return, but there is no liability incurred, paid or accrued by a member of the group according to its separate taxable income. Removal of such liability is one of several benefits derived from joining in a consolidated return.

We interpret the phrase 'paid or accrued' contained in the constitutional amendment to mean actually paid or a liability to pay. When filing a consolidated return the tax which would have been paid or accrued by a member

had it not joined the group is not determined nor is it necessary to be determined, except as required by the agreement between the parent and the members of the group. No such liability is ever incurred or accrued insofar as the taxing authority is concerned."

The federal constitutional question was disposed of by the Court of Civil Appeals in the Western Grain opinion in the following language: (Jurisdictional Statement, Appendix A(2) pp. 10-12)

> "Western contends that the application of the amendment and regulations in such manner is discriminatory as to corporations who choose to join in consolidated returns and is constitutionally impermissible.
>
> We are unable to perceive any discrimination. Every foreign corporation earning income in Alabama is taxed the same--upon taxable income after deduction of federal income taxes paid or accrued. The decision to join in a consolidated return for federal income taxes or file a separate return is that of the taxpayer. Filing a consolidated return is a privilege and results in a consolidated tax liability. 26 U.S.C.A. §1501. If it benefits in relief from federal taxes it may cost in the amount of deductions permitted by the State. Such results in a penalty by choice of the taxpayer. It is not discrimination by the State. We are cited to no case in point to the contrary."

The statute, Section 402(13), supra, which was construed in the Western Grain opinion provides that:

> **"In the case of foreign corporations doing business in this state the deductions allowed by this section shall only be allowed if and to the extent that they are connected with income arising from sources within the state of Alabama, and the proper apportionment and allocation of deductions with respect to the sources of income within and without the state of Alabama shall be determined under the rules and regulations prescribed**

by the department of revenue, provided, that in the case of a corporation doing a business partly within and partly without the state where revenue is apportioned or allocated to Alabama the expense in connection with such apportioned or allocated revenue shall be likewise apportioned or allocated to the state, for the purpose of deductions under this title, or the ratio that company expenses in Alabama bear to the company revenues in Alabama."

In the implementation of Section 402, supra, the Department of Revenue promulgated Regulation 402.2, Income Tax Laws and Regulations, supra. The Regulation provides as follows:

> "A foreign corporation doing business in Alabama is entitled to the same deductions allowed a domestic corporation, but only to the extent that they are connected with income arising from sources within the State. **A corporation having income from multistate operations may apportion its income in accordance with Reg. 398.2, in which case allowable deductions must also be apportioned in the same manner;** or such corporation may adopt a method of separate accounting, in which case the deductions allowable shall be those applicable to the income arising from sources within the State of Alabama.
>
> "Where a corporation operates both within and without Alabama and its books are kept so that its gross income in Alabama is determined without allocation, administrative and other apportionable expenses may be allocated to Alabama in accordance with the ratio of Alabama gross income to total gross income. The amount of Federal income tax allocated to Alabama should be determined by the ratio that the net income from sources within Alabama bears to the total net income from all sources as shown by the Federal income tax return. **The Federal income tax to be apportioned in this manner is the tax accrued as shown by the final Federal income and excess profits tax return of the taxpayer and reduced by any refund allowed and given during the tax year under the Federal statute. Such refund need not be included in**

> **income when apportionment is made in this manner."** (Emphasis supplied)

The amount of federal income tax allowed as a deduction under the Alabama Constitutional provision, implementing statutes and regulations is "the tax accrued as shown by the final Federal income and excess profits tax return." Obviously the amount as final is that sum which is owed after all deductions and credits have been computed. The Court of Civil Appeals of Alabama in both the instant case and the Standard Oil case, supra, found that the first return was that filed by the parent with the I.R.S.

The case of **Trunkline Gas Company v. Collector of Revenue,** 182 So.2d 674, cert. denied, 248 La. 1101, 184 So.2d 25, appears to State's counsel to be the earliest judicial statement in the United States on the present controversy. The case clearly supports the position of the State of Alabama. Because of its pertinence, counsel for the State quotes at length from the **Trunkline** case.

The syllabus states the matter succinctly and demonstrates the similarity between the Louisiana case and the instant case in controversy as follows:

> "Delaware corporation, which did business in Louisiana, brought suit against the Collector of Revenue for review of decision of Board of Tax Appeals. The 19th Judicial District Court, Parish of East Baton Rouge, Jess Johnson, Jr., entered a judgment adverse to the Collector of Revenue, and he appealed. The Court of Appeal, Bailes, J., held that payment by parent corporation of federal income taxes on consolidated return which accounted for and included net income of some affiliates, including Delaware corporation doing business in Louisiana, as well as operating losses of other affiliates, all wholly owned by parent, was not payment in fact of federal

income taxes by Delaware corporation within contemplation and intendment of Louisiana statutes so as to entitle Delaware corporation to full credit reduction for Louisiana state income tax purposes of federal income taxes of Delaware corporation attributable to Louisiana derived income which Delaware corporation computed to be due federal government as though Delaware corporation were paying federal income tax on basis of separate tax return."

Louisiana had a regulation at the time the tax controversy arose in the above case governing the filing of a consolidated return by a parent when an affiliate was doing business in Louisiana. The Court of Civil Appeals of Alabama in both Western Grain, supra, and Standard Oil, supra, determined that Regulation 402.2, supra, implemented the Alabama statute, Section 402(13), supra, even as the Louisiana statute had been implemented by regulations.

The Court in the Louisiana case, supra, stated the contentions of the parties in the Louisiana controversy. The contentions of the Collector of Revenue of Louisiana were as follows:

"1. There is no conflict between R.S. 47:55 and R.S. 47:241;

2. The calculation of a separate federal tax return is not payment of federal income taxes within the meaning of the above two statutes; and

3. The federal income tax deduction allowed on Louisiana income to nonresident foreign corporations in an equitable pro rata share of the consolidated federal income tax paid."

Trunkline's contentions were as follows:

"1. Trunkline Gas Company did actually pay the amount of federal income tax for which it claims deduction; and

2. ITR 55.2 is not in accord with the provisions of R.S. 47:241, et seq., relating to the determination of net income of foreign corporations having Louisiana income."

In disposing of the contention of Trunkline in regard to the conflict between Internal Revenue Regulation 55.2 and Revenue Statute 47:241, the Court state in quoting from the case of **Collector of Revenue v. Hunt**, 246 La. 605, 165 So.2d 843 as follows:

" 'Section 55 [referring to R.S. 47:55 (4)] prohibits the deduction of income taxes paid on net income on which no Louisiana income tax has been paid or will be paid. Moreover, Section 241 provides that the amount of federal income tax to be deducted shall be that portion of the total federal tax 'which is levied with respect to the particular income derived from sources in this state.' Hence, the law is clear that the deductible federal income tax is that paid on state-taxed income.' "

The pith of the opinion in **Trunkline**, supra, was as follows:

"We find, and so hold, that the payment by the parent company, Panhandle Eastern Pipe Line Company, of federal income taxes on a consolidated return which accounts for and includes net income of some affiliates, including Trunkline Gas Company, as well as operating losses of other affiliates, all wholly owned by the parent company, is not payment in fact of federal income taxes within the contemplation and intendment of LSA-R.S. 47:55, 47:241 as to entitle Trunkline Gas Company to full credit deduction of the federal income tax attributable to Louisiana derived income which it computes to be due the federal government as though it were paying this tax on the basis of a separate tax return. On this premise, it conclusively appears to us that the manner of allocating the portion of federal income tax to which Trunkline is entitled to deduct in arriving at net income produced from the designated Louisiana sources as prescribed by ITR 55.2 results in a credit of

an equitable pro rata share of the consolidated federal income tax paid." (Emphasis supplied)

The case of **Cities Service Gas Company v. McDonald**, 204 Kan. 705, 466 P.2d 277, is the exact reverse in its conclusions insofar as counsel for the State can determine. Stated cogently, the Supreme Court of Kansas holds that a member of an affiliated group can deduct what it pays to the parent corporation regardless of what the parent pays to the I.R.S. on a consolidated return on behalf of the group. The Kansas court determined that the **Cities Service** case was different from the Louisiana case, supra, because in Louisiana the Collector of Revenue had promulgated a regulation governing the filing of a consolidated return and in Kansas no such regulation had been promulgated. However, it is obvious that the Kansas court determined the issue on adequate state grounds and no federal question was involved.

The case of **Standard Oil Company v. State**, 294 Ala. 3, 313 So.2d 532, delved intensively and thoroughly into the issues in the instant controversy. The syllabi in the reported case cogently summarize the holdings in the Standard Oil case and demonstrate how thoroughly the opinion in Standard Oil determines the issues in the present case. In regard to Constitutional Amendment, syllabus 1 stated:

> "Constitutional amendment relating to the deduction of corporate federal income taxes in computing state income tax must be construed in light of Department of Revenue regulation which existed at that time and which concerned the same subject."

In syllabus 3, the fact that the new Constitutional Amendment should not be construed to alter or change drastically an existing system is emphasized as follows:

> "New constitutional provision adopted by people already having well-defined institutions and systems of law should not be construed as intending to abolish the former system, except insofar as it is in manifest repugnance to the new constitution, but such provision should be read in light of former law and existing system."

The fact that filing accounting statements by affiliate with parent did not result in payment or accrual of federal income taxes is set forth in syllabus 4, as follows:

> "Where foreign corporation's subsidiary did not file federal income tax returns but filed accounting statements with parent showing amount subsidiary would have had to pay IRS had it filed with them and parent then filed with IRS the amount of income reported by affiliates, no federal income tax was 'paid or accrued' by subsidiary by filing accounting statements, within constitutional amendment providing that corporate federal income taxes paid or accrued are deductible in computing state income taxes, and subsidiary, in computing state income taxes, was not entitled to deduct amount reported to parent but only a percentage of actual amount of cash paid to IRS by parent."

Syllabus 5, states that payment by affiliate to the parent did not constitute federal income taxes paid within the meaning of Alabama law. The syllabus states:

> "Investment credits allowed under federal tax law to reduce tax liability of corporate taxpayer to IRS did not constitute 'payment' of federal income taxes for purposes of computing deduction to be allowed corporation on state income tax return for federal income taxes paid."

The fact that state law and not federal law should control in deciding the instant case is contained in syllabus 6, as follows:

> "State law and not federal law was controlling in determining whether investment credits allowed under

federal tax law to reduce tax liability of corporate taxpayer to IRS constituted 'payment' of federal income taxes for purposes of computing deduction to be allowed corporation on state income tax return for federal income taxes paid."

The colloquy between counsel for the State and witness for Western Grain, Mr. James W. Robertson (R. pp. 92-95) reveals only accounting statements were filed by Western Grain, the affiliate with the parent, Diversa, and Diversa did not, in fact, pay any income tax to the I.R.S. The colloquy follows, in part:

"Q Now, I want to get to this, Mr. Robertson, and that is specifically what type of return is filed by Western Grain with Diversa?

"A I'm not sure what you mean.

"Q Well, do they file a regular Internal Revenue Service form as though they were making out a separate return that could go into the Internal Revenue Service by itself?

"A It's in effect sort of like that, yes.

"Q **Is it on a federal return form?**

"A **No. The consent is the 851 and the -- then there is no prescribed forms for consolidated returns except they lay out what you're supposed to put in there.**

"Q Right. They file an accounting statement that reflects their income, their deductions and what they would be due to be paid in federal tax if filing separately?

"A Now, restate that.

"Q **They file an income tax statement or they file an accounting statement is what I mean to say in which they show their income, their liabilities, their deductions and likewise the amount of income tax that they would have to pay if they were filing a federal income tax**

return directly with the Internal Revenue Service as an individual corporation and no part of an affiliated group?

"A **Well, they do all but they don't necessarily show the income tax due.**

"Q **They do not necessarily show that. In other words what you're saying is that they may just show their income statement?**

"A **If they didn't pay any income tax to the common parent that wouldn't be any there.**

"Q **I'm going to ask you again: Did Diversa make any payment of federal income tax in the years '64, '65 and '66 to the Internal Revenue Service?**

"A **No.**" (Emphasis Supplied)

The witness for the State, Mr. V. S. McElvy, Supervisor, Corporate Income Tax Section, State of Alabama, on examination by state's counsel after referring to provisions in Section 402(13) and Regulation 402.2, supra, regarding apportionment of income and deductions stated that final return meant final return filed by taxpayer with I.R.S. He likewise gave an expert opinion of accrued as requiring subsequent payment. The colloquy was, in part, as follows: (R. p. 110)

"A The federal income tax to be apportioned in this manner is the tax accrued as shown by the final federal income tax -- final federal income and excess profit tax return of the taxpayer and reduced by any refund allowed and given during the tax year under the federal statute.

"Q Now, Mr. McKelvie, are you familiar as an accountant, are you familiar with the accounting term accrued?

"A Yes, sir.

"Q What is your interpretation in regard to accrual and subsequent payment thereof?

"A Well, an item to be accrued or accruable must be finally determined and fixed. It must not be continued and after it's finally determined and fixed it's accrued at that time. Accrual refers to a time and not an amount.

An accrual of an item can be any amount. It refers to a time and if after you have accrued something that is finally determined and fixed is to be subsequently paid.

The discharge of an accrued item must take place as well as the item becomes finally fixed."

REVIEW OF ADDITIONAL CASES CITED BY WESTERN GRAIN IN SUPPLEMENTAL JURISDICTIONAL STATEMENT (JURISDICTIONAL STATEMENT, PP. 3-4)

A review of the additional cases cited by the Appellant in the Supplemental Jurisdictional Statement reveals that these cases do not come to grips with the issue involved herein; that is, the construction of a state statute and a state regulation by the State Courts, circuit and appellate, in the instances wherein the question presented is the amount of federal income tax to be deducted on the state income tax return by an affiliate corporation where the affiliate files an accounting statement with the parent and the parent files a consolidation of all these statement as a return with the I.R.S.

The cases are concerned with application of federal law to the filing of federal income tax returns.

CASE PRESENTS NO FEDERAL QUESTION

The State like the Appellant, Western Grain, finds no federal cases exactly in point to sustain the state's position that no federal question is presented.

However, the following cases are concerned with the lack of jurisdiction of the federal courts over questions of state or local concern and the refusal of the U.S. Appellate Courts to assume jurisdiction in purely state matters.

The case of **Sadler v. Jester,** 46 F.Supp. 737, states that no federal question is involved where the right to a state office in the State of Texas is contested in the state courts by residents of Texas.

The case of **Phoenix Ins. Co. v. Gardner Treasurer of Kings County New York,** 78 U.S. 204, 11 Wall. 204, 20 L.Ed. 112, (1871) although over a hundred years old, appears to not only deny the presence of a federal question in the **Phoenix** case but likewise to cite numerous cases involving the fact of whether a federal question is raised. The most **pertinent** statement in the opinion is as follows:

"Now we have repeatedly held that the construction of a state statute belongs to the state courts, and is not a Federal question which we can revise with a writ of error to a state court. It is true, if the state court gives such a construction to a state statute as to make it conflict with the Constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said Constitution or laws, then a Federal question is raised, and we can review the decision on the point of the validity of the statute."

In the case of **French v. Taylor,** 26 S.Ct. 76, 199 U.S. 274, 50 L.Ed. 189, related to the construction of a state taxing statute and the Court said no federal question was involved unless the statute as construed by the state courts deprived the litigant of property without due process.

In the case of **Hooper v. City of Oshkosh,** 213 N.W. 285, 192 Wis. 523, it was determined that action to recover personal

property tax on ground that Laws 1925, C57, Section 1, repealing personal property tax of 1924 as offset on income taxes, deprived plaintiff of due process in contravention of U.S.C.A. Constitutional Amendments 5 and 14, Section 1, held to involve no federal question. Only a state question concerning a state statute had to be construed by state courts.

In **Dougherty v. Nevada Bank of San Francisco, Cal.**, 16 S.Ct. 258, 160 U.S. 171, 40 L.Ed. 382, refused a writ of error to review a judgment of a state court which had claimed the right to foreclose a municipal tax on street assessment lien on the ground that an extension of time for performance granted after expiration of time limited in contract therefor was invalid. It was dismissed for want of jurisdiction on the basis that no federal question was involved.

Corkran Oil and Development Co. v. Arnaudet, 26 S.Ct. 41, 199 U.S. 182, 50 L.Ed. 143, was concerned with the judgment of a state court denying the right of possession of real property under a title founded on an act of Congress, which rested upon the ground that the title of the adverse party under a tax deed was made good by prescription under the Constitution of the state of Louisiana. No federal question was involved so that a writ of error could be sustained to the Supreme Court of the United States.

CONCLUSION

The cases cited in the Jurisdictional Statement of the Appellant (Jurisdictional Statement, Appendix A(2) p. 7) and in the Supplemental Jurisdictional Statement pp. 3-4 and the cases cited by the State under the heading, There Is No Federal Question are not directly concerned with the issues at hand.

There are four state cases, i.e., the instant case, **Western Grain v. State**, 318 So.2d 719; the case of **Standard Oil of Kentucky v. State**, 294 Ala. 3, 313 So.2d 532; the case of **Trunkline Gas Co. v. Collector of Revenue**, 182 So.2d 674, cert. denied, 248 La. 1101, 184 So.2d 25; and the case of **Cities Service Gas Company v. McDonald**, 204 Kans. 705, 466 P.2d 277, which are concerned with the specific issue herein. The issue is whether a state may by statute provide for a method by which an affiliate filing a consolidated return through a parent deducts its federal tax on its state return on a pro rata basis. In the first two cases above, **Western Grain**, supra, and **Standard Oil**, supra, the Court of Civil Appeals of Alabama found that the state had a statute which covered the question of deduction of federal tax on the state return and that the state had further emphasized and implemented the statute by regulation.

The Supreme Court of Louisiana in the **Trunkline** case, supra, likewise found the statute of Louisiana covered the question of deduction of federal income taxes on the state return and that Louisiana had implemented the statute by a regulation.

The Kansas Supreme Court in the **Cities Service** case, supra, found that the statute in Kansas had not been implemented by regulation. This lack of implementation appears to have been the primary reason for deciding that Kansas did not provide a method for deduction of federal taxes on the Kansas income tax return on a proportional basis.

The above cases sustain the State's grounds for affirmation of the final judgment and decree of the Alabama Court of Civil Appeals, (Jurisdictional Statement, Appendix A(2)), and the denial of certiorari (Jurisdictional Statement, Appendix A(4))

and in the alternative to dismiss the appeal (Jurisdictional Statement Appendix C(1)) filed with this Honorable Court.

The opinions in the four cases decide the issues on adequate state basis, without resort to a federal question and after reading the above opinions, it is obvious that the questions presented in the jurisdictional statement are so unsubstantial that no further argument is warranted.

Also the seven questions postulated by counsel herein, above, are answered by the opinions in the above four cases. The opinion of the Court of Civil Appeals was in no way repugnant to the U.S. Constitution nor the Alabama Constitution (Question 1). The Alabama Constitutional Amendment, CCXII, supra, is fairly and equitably applied to a corporation, Western Grain, in a class and all others in the class are dealt with in the same manner. (Question 2.)

The statute, Section 402(13), supra, and the implementing regulation, 402.2, supra, are fair and equitably applied in the Court's opinion to the Appellant. It is required to apportion its income to Alabama and it is allowed to deduct its federal income tax on a proportionate basis when filing its state income tax return. (Question 4, 5 and 6)

The opinions in the above cases disclose a basic state question, involving state law, decided by the state courts fair and equitably and there remains no substantial question to be decided; therefore, the jurisdiction of the Supreme Court of the United States is not invoked.

The appeal of Western Grain, (Appendix C(1) Jurisdictional Statement) should be dismissed and the opinion of the Court

of Civil Appeals of Alabama (Appendix A(2), Jurisdictional Statement) and the Denial of Certiorari by the Alabama Supreme Court (Appendix B(1) Jurisdictional Statement) should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, James R. Payne, one of the Attorneys for the Appellee, State of Alabama, in this cause, hereby certify that on the 20th day of February, 1976, I served copies of the foregoing motion to affirm or motion to dismiss on Honorable Morris K. Sirote, Sirote, Permutt, Friend & Friedman, 2030 First Avenue No., Birmingham, Alabama, as Counsel for the Appellant, Western Grain Company, by mailing a copy of same to him in a duly addressed envelope, with first class postage prepaid, United States mail.

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